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2 HONORABLE BENJAMIN H. SETTLE
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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 HP TUNERS, LLC, a Nevada limited liability company,) CASE NO. 3:17-cv-05760-BHS
9 Plaintiff,)
10 vs.) **PLAINTIFF'S RESPONSE IN
11 KEVIN SYKES-BONNETT and SYKED) OPPOSITION TO DEFENDANTS'
12 ECU TUNING INCORPORATED, a) EMERGENCY MOTION FOR
Washington corporation, and JOHN) TEMPORARY RESTRAINING ORDER
13 MARTINSON,) **NOTING DATE: AUGUST 29, 2018**
14 Defendants.) **ORAL ARGUMENT REQUESTED****

15 Plaintiff HP TUNERS, LLC, a Nevada limited liability company ("HPT" or "Plaintiff"),
16 for its Response in Opposition to Defendants' Emergency Motion for Temporary Restraining
17 Order (Dkt. 69), states as follows:

18 **INTRODUCTION**
19

20 In light of Defendants' dishonesty since the outset of this matter, it is not surprising that
21 Defendants' Emergency Motion for Temporary Restraining Order is replete with factual
22 inaccuracies, misstatements and mischaracterizations. The claim that HPT paid someone to
23 "surreptitiously gain access to the personal computer of Kevin Sykes-Bonnett" is baseless and
24 not supported by *any* facts.

Here, Defendants' rhetoric and bluster should be seen for what it is – a desperate attempt to divert the Court's attention from: (a) Defendants' unlawful use, possession and misappropriation of HPT's confidential and proprietary intellectual property; (b) Defendants' intentional concealment of relevant and material information in discovery; and (c) Defendants' general abuses, gamesmanship and misconduct in connection with the discovery and pleadings in this case.

Defendants' request for injunctive relief is based on HPT's alleged possession of "two hardware design documents" and related "binary files." However, contrary to Defendants' contentions, all of the materials have been destroyed by HPT and are only being maintained by counsel as "Highly Confidential" in accordance with the Stipulated Protective Order entered in this case. HPT has destroyed all, and does not possess any, copies of any of Defendants' hardware design documents or binary files. In addition, in connection with the business of HPT, HPT has not used, accessed, referenced or misappropriated the "binary files" or the "two hardware design documents" in any manner or regard whatsoever. Furthermore, HPT does not possess any confidential and proprietary information relating to Defendants' software or hardware products.

For the reasons set forth herein, Defendants have failed to meet their burden for the issuance of the extraordinary remedy sought, and Defendants' Emergency Motion for Temporary Restraining Order should be denied.

BACKGROUND

As detailed in HPT’s Renewed Emergency Motion for Temporary Restraining Order, from the outset, HPT has been candid, forthcoming and completely transparent with Defendants and this Court regarding the manner in which it received the information from the anonymous

1 informant as detailed in its Renewed Emergency Motion for Temporary Restraining Order (Dkt.
2 62) and the Declaration of Keith Prociuk submitted in connection therewith. For ease of
3 reference, the underlying factual background is also set forth herein.

4 In connection with HPT's investigation concerning the misappropriation and misuse of
5 its confidential and proprietary information, which investigation remains ongoing, on May 27,
6 2018, counsel for HPT was approached, by electronic mail, by an individual claiming to be
7 *already* in possession of pictures, information and names of individuals in possession of HPT's
8 confidential and proprietary information and who were misappropriating it for their own benefit.
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10 Specifically, in the May 27, 2018 email, the anonymous informant (using the email
11 address gregorygilvach@hotmail.com) stated:

12 Hello,

13 We have information regarding Kevin Sykes Bonnett. We
14 will keep our identity disclosed. But we have pictures,
15 information, names that will prove he is guilty of selling hacked
16 credit, modify the firmware of VCM interface, and more. If you
17 can contact me back, so we can talk further.

18 IMPORTANT : This email address will be disabled in 5 days.

19 Thank you

20 Anonymous

21 (A copy of the initial email communication to counsel for HPT dated May 27, 2018 is attached
22 hereto as Exhibit A).

1 Subsequently, preliminary email communications between counsel and the anonymous
 2 informant¹ and the preliminary evidence provided by the anonymous informant led HPT to
 3 believe that such information existed, was highly credible and was, in fact, already possessed by
 4 the anonymous informant. For example, on May 29, 2018, the anonymous informant sent
 5 another email with a cropped picture showing a screenshot of HPT's proprietary key generator
 6 tool and program – which constituted highly proprietary information of HPT that should not be
 7 in the possession of third parties. (A copy of the email communications and screenshot provided
 8 by Mr. Gilvach is attached hereto as Exhibit B).

9
 10 Based on the nature of the communications from the anonymous informant and the
 11 proofs which were tendered in connection with such communications, additional electronic mail
 12 communications ensued. Ultimately, after several email communications, the anonymous
 13 informant agreed to provide HPT with evidence and information in exchange for a reward.
 14 However, with regard to the turnover of evidence and information in its possession, the
 15 anonymous informant required that his or her identity remain anonymous and that HPT would
 16 tender a reward in the form of crypto-currency (Bitcoin) in exchange for the information and
 17 evidence. Based on the preliminarily detail supplied by the anonymous informant giving strong
 18 weight to the credibility of the information and evidence, HPT proceeded with a series of
 19 transactions in which HPT tendered a reward to the anonymous informant in exchange for
 20 information and evidence relating to the misappropriation and misuse of HPT's confidential and
 21 proprietary information.

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 24 ¹ All of the documents and communications with the anonymous informant have been
 25 produced by HPT to Defendants in this matter.

1 On August 5, 2018, the anonymous informant finally provided the evidence to HPT.
 2 Incredibly, the evidence and information specifically demonstrated: (a) Defendants' wrongful,
 3 unlawful and improper possession, use and misappropriation of HPT's confidential and
 4 proprietary intellectual property; (b) that a former owner of HPT (Ken Cannata) wrongfully
 5 furnished and disseminated such information to Defendants; (c) that Mr. Cannata and/or his wife
 6 Bobbie Cannata were owners of Syked ECU Tuning, Inc.; and (d) that Mr. Cannata and/or
 7 Bobbie Cannata were acting in concert with Defendants dating back to before this action was
 8 ever commenced. As detailed in HPT's Renewed Emergency Motion for Temporary Restraining
 9 Order and Preliminary Injunction (Dkt. 62) and Reply Brief in further support of its motion (Dkt.
 10 77), Defendants do not dispute or deny and, in fact, admit to their possession, use and
 11 misappropriation of HPT's confidential and proprietary intellectual property.

13 Here, notwithstanding Defendants' claims and rhetoric, the evidence demonstrates that,
 14 on May 27, 2018, an anonymous witness approached counsel for HPT to inform HPT that he or
 15 she was *already* in possession of evidence demonstrating Mr. Sykes-Bonnett's receipt,
 16 possession, misuse and misappropriation of *HPT's* confidential and proprietary information.
 17 (See Exh. A). In addition, the evidence demonstrates that, contrary to Defendants' contentions,
 18 HPT did not pay "an anonymous hacker to surreptitiously gain access to the personal computer
 19 of Kevin Sykes-Bonnett."² To the contrary, the anonymous informant was in possession of the
 20 information prior to the time he or she approached counsel for HPT.

22 For example, one of the images of Mr. Sykes-Bonnett's computer shows a date in
 23 *November 2017* – more than 6 months before any communications between the anonymous

24 _____
 25 ² Notably, by virtue of their contentions in their Emergency Motion for Temporary
 Restraining Order, Defendants are admitting that the images depict the computer of Mr. Sykes-
 Bonnett and his possession of HPT's confidential and proprietary intellectual property.

1 informant and HPT took place. (See Exhibit C attached hereto on which a date in November
 2 2017 is visible in the bottom right corner of the image where it appears on a computer in a
 3 Windows based desktop). Similarly, certain images were tendered by the anonymous informant
 4 showing his possession of such information in May 2018 before HPT engaged in any transaction
 5 with the anonymous informant. (See e.g. Exh. A and B). Consequently, the timeline detailed
 6 above as well as the images themselves refute Defendants' assertions in this regard.
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8 Defendants' vague and unsupported contention at page 2 of the Motion that "HPT asked
 9 to be provided with any of Syked Tuning's confidential information that the anonymous hacker
 10 could steal" is contrived and is undermined by the communications which have been produced.
 11 Defendants' wholly misrepresent, mischaracterize and misstate the nature of the communications
 12 with the anonymous informant. Nowhere in the communications is there any evidence that HPT
 13 sought or requested any information of Syked ECU Tuning, Inc. at any time. To the contrary, all
 14 of the communications were centered on evidence in the possession of the anonymous informant
 15 bearing on the possession, use and misappropriation of HPT's confidential and proprietary
 16 intellectual property by Defendants and any third parties.

17 HPT does not know how the anonymous informant obtained the information and HPT did
 18 not pay anyone to 'hack' or otherwise obtain the information. To the contrary, HPT only
 19 provided a reward to the informant to be able to see the information after the informant had
 20 already gained possession of the materials and only for the purpose of protecting itself.
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22 Defendants' suggestion that the information was "surreptitiously" or "illegally" obtained
 23 from Mr. Sykes-Bonnett in connection with "TeamViewer"³ sessions is baseless and
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25 ³ "TeamViewer" is computer software for remote control, desktop sharing, online meetings, web conferencing and file transfer between computers.

1 manufactured. By its nature, a “TeamViewer” session is a remote screen sharing tool that is
 2 voluntary and cannot be conducted without the affirmative consent of and action taken by both
 3 of the parties to the session. Mr. Sykes-Bonnett knows full well each of the individuals with
 4 whom he has conducted a “TeamViewer” session over the last two plus years and he voluntarily
 5 shared his screen with those third parties during the course of those sessions.⁴ During the course
 6 of this voluntary screen sharing session, Mr. Sykes-Bonnett made his computer screen available
 7 to the party with whom he was conducting the “TeamViewer” and it revealed his wrongful
 8 possession of HPT’s confidential and proprietary intellectual property. There is nothing
 9 surreptitious, illegal or improper about taking a picture of the person’s computer screen who is
 10 voluntary sharing his or her screen during a “TeamViewer” session. In contrast, Mr. Sykes-
 11 Bonnett’s unauthorized use and possession of the confidential and proprietary intellectual
 12 property of HPT on his computer is illegal, unlawful and improper.

14 Here, HPT was well within its rights to provide a reward to the informant in exchange for
 15 information that the informant had in its possession and which related to the identity of third
 16 parties who are wrongfully using, possessing and misappropriating HPT’s intellectual property.
 17 Defendants’ possession as well as their use and misappropriation of HPT’s confidential and
 18 proprietary intellectual property is criminal. Specifically, Defendants possess and are using
 19 something that they do not own and that does not belong to them for their own benefit and to the
 20 detriment of HPT. Much like state, federal and governmental agencies and authorities who

22 ⁴ Because Mr. Sykes-Bonnett undoubtedly knows the identity of all the persons he has
 23 conducted “TeamViewer” sessions with over the last two years, Mr. Sykes-Bonnett must know
 24 precisely who the anonymous informant is. HPT has sought discovery from Defendants
 25 concerning the identity of all persons with whom Mr. Sykes-Bonnett has conducted TeamViewer
 sessions since January 1, 2016; however, Defendants have not yet responded to the discovery on
 this issue.

1 provide monetary rewards to third parties in exchange for information, HPT had a right to protect
 2 itself and to obtain the evidence and information in the possession of the anonymous informant
 3 who came forward. Defendants have failed to point to any state or federal statute, regulation or
 4 policy which specifically prohibits compensation of an anonymous informant. In fact, as this
 5 Court is well aware, in connection with federal cases and investigations, confidential informants
 6 are routinely used and compensated. HPT cannot be expected to sit on its hands and do nothing
 7 when a witness comes forward with credible information bearing on its investigation of
 8 misconduct relating to its intellectual property. This is particularly true here in light of the depth
 9 of the deception, dishonesty and gamesmanship that has been employed by Defendants (and Ken
 10 Cannata) since before this action was commenced.

12 With regard to the actual information received from the anonymous informant,
 13 Defendants' assertions concerning HPT's receipt of and alleged misappropriation of alleged
 14 proprietary information of Syked ECU Tuning, Inc. are exaggerated and not well founded.
 15 Defendants contend that the anonymous informant provided HPT with "two hardware design
 16 documents depicting highly confidential schematics and layouts for Syked Tuning's newest
 17 hardware cable product." In addition, Defendants vaguely assert there "are several binary files
 18 and emails that are clearly confidential in nature on their face."⁵

19 While HPT disputes and denies Defendants' claims of confidentiality, and affirmatively
 20 contends, upon and information and belief, that Defendants' hardware is based on, derived from
 21 and incorporates HPT's confidential and proprietary information wrongfully possessed by

23 ⁵ The anonymous informant provided only three emails to HPT – all of which have been
 24 produced. Notably, Defendants are in receipt of these emails and have not asserted that anything
 25 in the emails other than the alleged "binary files" and "two hardware design documents" are
 "highly confidential" or proprietary in any manner.

1 Defendants, this is an issue for another day. Nevertheless, following receipt of an email
2 communication dated August 17, 2018 from counsel for Defendants asserting that the particular
3 hardware design documents and associated files are highly confidential, the materials were
4 destroyed by HPT and are only being maintained by counsel as “Highly Confidential” in
5 accordance with the Stipulated Protective Order in this case. (*See* Declaration of Andrew P.
6 Bleiman, Esq. (“Bleiman Decl.”) submitted in connection herewith). HPT has destroyed all, and
7 does not possess any, copies of any of Defendants’ hardware design documents or binary files.
8 (*See* Third Declaration of Keith Prociuk (“Prociuk Third Decl.”) submitted in connection
9 herewith). In addition, in connection with the business of HPT, HPT has not used, accessed,
10 referenced or misappropriated the “binary files” or the “two hardware design documents” in any
11 manner or regard whatsoever. (*See* Prociuk Third Decl.). Furthermore, HPT does not possess
12 any confidential and proprietary information relating to Defendants’ software or hardware
13 products.⁶ (*See* Prociuk Third Decl.). Consequently, Defendants’ claims concerning HPT’s
14 alleged possession of Defendants’ “binary files” and “two hardware design documents” are not
15 well founded nor do they provide a basis upon which to impose injunctive relief.

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⁶ All of these facts further serve to wholly undermine Defendants’ claims that HPT sought to purchase Defendants’ information for competitive purposes as HPT has not used and does not possess Defendants’ information.

ARGUMENT

DEFENDANTS' MOTION FOR TEMPORARY RESTRAINING ORDER

SHOULD BE DENIED.

A. LEGAL STANDARD

A preliminary injunction is an “extraordinary and drastic remedy, [which] is never awarded as of right.” *Munaf v. Green*, 553 U.S. 674, 689 (2008) (internal citations omitted). In order to qualify for a preliminary injunction, the moving party must establish “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, —, 129 S.Ct. 365, 374 (2008).

Courts in the Ninth Circuit analyze these requirements under a “sliding-scale approach.” *Alliance for the Wild Rockies v. Cottress*, 632 F.3d 1127, 1131–1135 (9th Cir. 2011). A moving party who demonstrates that he is likely to suffer an irreparable injury and that an injunction is in the public interest must show that “serious questions going to the merits were raised and that the balance of hardships tips sharply in the [moving party’s] favor.” *Id.* at 1134–35.

B. DISCUSSION OF THE MERITS

Defendants' motion is not well founded in law or fact. First, Defendants cannot establish any likelihood of success on the merits of any claim because there is no pending claim relating to any alleged possession, use or misappropriation of Defendants' alleged confidential and proprietary information. Moreover, any such claim would be frivolous and unfounded because, in connection with the business of HPT, HPT has not used, accessed, referenced or misappropriated the "binary files" or the "two hardware design documents" in any manner or

1 regard whatsoever. (*See* Prociuk Decl.). In addition, HPT has destroyed all, and does not
 2 possess any, copies of any of Defendants' hardware design documents or binary files. (*See*
 3 Prociuk Decl.). Likewise, HPT does not possess any confidential and proprietary information
 4 relating to Defendants' software or hardware products. (*See* Prociuk Decl.). By virtue of
 5 Defendants' designation of these items as "Highly Confidential", these items are only being
 6 maintained by counsel as "Attorneys' Eyes Only" pursuant to the Stipulated Protective Order in
 7 this case. (*See* Bleiman Decl.). The Stipulated Protective Order herein governs the use and
 8 protection of such documents and obviates the need for injunctive relief on this issue.
 9 Furthermore, because HPT does not possess and has destroyed all copies of the "binary files"
 10 and "two hardware design documents" (except as may be maintained by counsel in accordance
 11 with the Stipulated Protective Order), this issue is moot, and the requested injunctive relief
 12 should be denied.

14 Furthermore, Defendants will **not** suffer irreparable harm in the absence of injunctive
 15 relief because HPT does even not possess or have access to the alleged documents in question.
 16 Defendants cannot establish irreparable harm by virtue of the possession of the documents by
 17 counsel with a designation as "Highly Confidential" in accordance with the Stipulated Protective
 18 Order.

19 A temporary restraining order or preliminary injunction is only appropriate where the
 20 "balance of hardships tips sharply in the [movant's] favor," *Alliance for the Wild Rockies*, 632
 21 F.3d at 1134–35 (9th Cir. 2011). Here, the balance of hardships does not tip sharply in
 22 Defendants' favor; therefore, the Defendants' Emergency Motion for Temporary Restraining
 23 Order should be denied.

1 Finally, a temporary restraining order or preliminary injunction is only appropriate where
2 granting the motion would be in the public interest. *Alliance for the Wild Rockies*, 632 F.3d at
3 1134–35 (9th Cir. 2011). Here, but for the anonymous informant’s decision to come forward and
4 provide detailed, specific evidence of Defendants’ wrongful possession, use and
5 misappropriation of HPT’s confidential and proprietary intellectual property, Defendants’
6 unlawful misappropriation of HPT’s confidential and proprietary intellectual property and
7 misconduct might still be undiscovered, particularly in light of Defendants’ blatant concealment
8 and deception in this regard for more than a year. It is in the public interest that witnesses who
9 have evidence of persons engaging in wrongful and unlawful misconduct concerning the
10 intellectual property of others are not disincentivized from coming forward to report such
11 misconduct and to provide evidence of the same. Enjoining HPT from investigating these
12 matters, communicating with anonymous third-party witnesses and defending itself with the
13 assistance of these sources would be improper. As such, the public interest does not favor
14 thwarting the investigation and discovery of misconduct and the injunction order should not
15 issue.

17 Finally, the relief sought by Defendants is unnecessary, overly restrictive and improper.
18 As detailed above, the injunction order concerning the segregation of the information relating to
19 Defendants (namely, the identified hardware design documents and binary files) is moot as HPT
20 does not possess those documents, and the challenged documents have been designated as
21 “Highly Confidential” and are being afforded such protection in accordance with the Stipulated
22 Protective Order. In addition, HPT has already produced *all* of the documents and
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1 communications with the anonymous informant.⁷ Consequently, Defendants are already in
 2 possession of all communications, provided by or to, or exchanged with the anonymous
 3 informant. Notwithstanding, an injunction order is not the mechanism for dealing with
 4 discovery-related issues of this sort. Likewise, HPT should not be enjoined from communicating
 5 with the anonymous informant or any other witnesses, particularly, here, where Defendants have
 6 concealed this information and where the information that has been provided is credible and
 7 bears directly on HPT's claims. There is no prohibition against communicating with anonymous
 8 informants and an injunction order prohibiting such communications would be highly prejudicial
 9 and improper.

CONCLUSION

12 Defendants' emergency motion for temporary restraining order should be denied.
 13 Defendants have not and cannot establish any likelihood of success on the merits particularly
 14 where, as here, there is no underlying claim pending. Defendants have also failed to demonstrate
 15 that they will suffer irreparable harm in the absence of injunctive relief. HPT has destroyed all,
 16 and does not possess any, copies of any of Defendants' hardware design documents or binary
 17 files. HPT does not possess any confidential and proprietary information relating to Defendants'
 18 software or hardware products. Furthermore, in connection with the business of HPT, HPT has
 19 not used, accessed, referenced or misappropriated the "binary files" or the "two hardware design
 20 documents" in any manner or regard whatsoever. Similarly, the balance of hardships does not
 21 strongly favor Defendants and the public interest weighs against the entry of the injunctive relief

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 24 ⁷ There were no oral or other electronic communications (e.g. videoconference, Skype, text
 25 message, FaceBook, etc.) between the anonymous information and counsel for HPT. All
 communications with the anonymous informant were conducted by email. (*See* Bleiman Decl.).

1 sought herein. For these reasons, Defendants' Emergency Motion for Temporary Restraining
2 Order (Dkt. 69) should be denied.

3 WHEREFORE, HP TUNERS, LLC, respectfully prays for an order DENYING
4 Defendants Kevin Sykes-Bonnett, Syked ECU Tuning, Inc. and John Martinson's Emergency
5 Motion for Temporary Restraining Order (Dkt. 69) and for such other and further relief as this
6 Court deems necessary and appropriate.

7 Dated this 24th day of August, 2018

8 Respectfully submitted,

9
10 s/ Andrew P. Bleiman
11 Attorneys for HP Tuners, LLC

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on August 24, 2018, I caused the foregoing to be electronically filed with
3 the Clerk of Court using the **CM/ECF system** which will electronically send Notice to all
4 Counsel of Record.

5 MARKS & KLEIN

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